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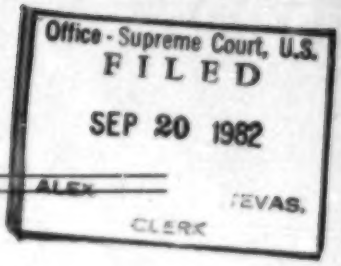

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LELAND LESTER SHAVER,
Petitioner,

V.

BOB L. HUNTER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RENEA HICKS

Advocacy, Incorporated
5555 North Lamar Blvd.
Suite K-109
Austin, Texas 78751
(512) 475-5543

Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether, as the state appellate court held, the Equal Protection Clause and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), prohibit a state from establishing a public policy that "single family" restrictive covenants may not be enforced to prevent three biologically unrelated, handicapped women and their housemother from residing together in a "single family" dwelling?

II. Whether this Court may vacate the judgment of a state court which *sua sponte* has adjudicated a federal constitutional issue when no parties to the suit had standing to raise the issue and when, unlike in *Doremus v. Board of Education*, 342 U.S. 429 (1952), the petition to this Court presents a justiciable case or controversy?*

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* The parties to the proceedings below were Leland Lester Shaver, Bob L. Hunter, John Zakrasek, Osco Abney, D.D. Tibbets, and Myron Hart.

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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1981

LELAND LESTER SHAVER,
Petitioner,

v.

BOB L. HUNTER, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Leland Lester Shaver petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Supreme Judicial District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Supreme Judicial District of Texas, sitting at Amarillo, Texas, is reported at 626 S.W.2d 574 and reproduced as Appendix A to this petition. The judgment and findings of fact and conclusions of law, as amended, of the 140th District Court of Lubbock County, Texas, are unreported, but reproduced as Appendix C to this petition.

JURISDICTION

The judgment of the Texas court of appeals was entered on December 3, 1981, (Appendix B, 10a). On May 12, 1982, the Supreme Court of Texas refused, on the basis of no reversible error, an Application for Writ of Error (Appendix B, 11a), and on June 23, 1982, the same court overruled a Motion for Rehearing on Application for Writ of Error (Appendix B, 11a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution is the only constitutional or statutory provision involved in this case. In relevant part it states:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Virginia Place is a one block addition to the City of Lubbock, Texas. It was subdivided on December 1, 1948, and, at that time, certain restrictive covenants—quoted in pertinent part at Appendix C, 15a-16a—were imposed upon its subdivided lots. Currently, there are fifteen lots in the addition, all of which are used for residential purposes.

In April, 1980, thirty two years after the subdivision's creation, Mr. Shaver, the petitioner herein, purchased a house on a corner lot of the subdivision. After widening three of the interior doorways and installing "grab bars" in one of the bathrooms to accommodate persons using wheelchairs, he leased the house to a local charitable, non-profit organization which has as its goal the provision of jobs and independent living alternatives for severely handicapped persons in the area. This organization, in close cooperation with Mr. Shaver, then helped three severely handicapped women, along with their housemother, move into the house. Two of these women were mentally retarded, one had cerebral palsy and had to use a wheelchair, and one—the housemother—was not disabled. None was related to the others by blood, marriage, or adoption.

The women's living arrangement can be briefly described as follows. Taking into account their different disabling conditions, the household chores—cooking, cleaning, etc.—are shared, and much of their daily life—eating dinner, watching television, making week-end plans—is lived together. The length of the women's residence in the home is indeterminate.

Upon the women's moving in, five of the neighbors in the subdivision promptly sued Mr. Shaver, seeking an injunction to force the handicapped women out of his house on the grounds that their living arrangement violated the restrictive covenants and the city zoning ordinance. After a non-jury trial, the state district court granted the injunction, based on the restrictive covenants.[1] It held that the covenants permit only "single-family residential uses" and that the handicapped women's living arrangement was not such a use. By so holding, it implicitly rejected Mr. Shaver's state law contentions that the "single family" stricture covered structures, not uses, that the women's living arrangement constituted a single family, and that the covenants were unenforceable because they were against state and federal public policy encouraging the development of such living alternatives for handicapped people. Also implicitly rejected was Mr. Shaver's argument that court-ordered enforcement of the restrictive covenants against the residents of Mr. Shaver's house would violate the Equal Protection Clause of the Fourteenth Amendment.

The Amarillo appellate court, to which Mr. Shaver seeks to have this Court issue a writ of certiorari, affirmed the state trial court's judgment. It, too, failed to address Mr. Shaver's federal constitutional argument; however, it did raise *sua sponte* a new federal constitutional issue.

Using state common law principles applicable to restrictive covenant cases,[2] Mr. Shaver had argued that public policy, as expressed at both state and federal levels, in combination with the unreasonableness of the convenant's application in this case, made the covenant unenforceable. Instead of disposing of this issue on the posited state law grounds, however, the appellate court turned to federal constitutional law. Without articulating the level of scrutiny it was applying, the court simply held that acceptance of Mr. Shaver's public policy argument would create an unconstitutional preference for handicapped persons in violation of the

[1] The state trial court ruled against the neighbors on the zoning issue, and the appellate court did not address it. It will not be discussed further in this petition.

[2] *See, e.g., Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981).

Equal Protection Clause as explicated in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 269–324 (1978). (App. A, 7a). When Mr. Shaver challenged the decision's rationale on this point in a motion for rehearing, the court refused to recede from its position – an unprecedented, far-reaching legal position it reached unbidden and without benefit of briefing or argument.

After the Supreme Court of Texas refused to hear the case, this petition ensued.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH CONTROLLING PRECEDENT FROM THIS COURT.

A. The decision below is in conflict with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is contrary to well-established principles of equal protection analysis, and egregiously misapplies *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The first step in analyzing an issue arising under the Equal Protection Clause is to determine what classification scheme is established by a law or rule. In the instant case, were the state to have in force a public policy prohibiting the enforcement of "single family" restrictive covenants to exclude unrelated handicapped people from residing together in small numbers,[3] the class burdened by the rule would be all unrelated, non-handicapped persons who wished to reside together in small numbers. (For simplicity's sake, this class will be referred to as all unrelated, non-handicapped people.)

The second step in this equal protection analysis is to determine whether the class burdened by the rule constitutes a "suspect" class or not. *See Plyler v. Doe*, 102 S.Ct. 2382, 2394 n.14 (1982) (overview of what constitutes a suspect class). Nothing in this Court's cases discussing the indicia of suspectness even remotely suggests that unrelated, non-handicapped people constitute a suspect class. Indeed, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) *(Belle Terre)*, the Court, by applying the rational basis test to a zoning

[3] It is important to note that the state law question on public policy never was resolved by the court below. In fact, none of the courts at the state level directly addressed the issue, and it remains unresolved.

classification scheme, implicitly held that unrelated persons who wish to reside together in small numbers do not constitute a suspect class. 416 U.S. at 8-9.

Belle Terre also supplies the next step in equal protection analysis when a suspect class is not involved:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable, not arbitrary'" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed v. Reed*, 404 U.S. 71, 76.

Belle Terre, 416 U.S. at 8. *See also Dandridge v. Williams*, 397 U.S. 471 (1970).

A state's objective in establishing a policy that "single family" restrictive covenants may not be enforced to prohibit small groups of handicapped persons from residing together would be to encourage the establishment of normalizing, more humane living arrangements for handicapped people. There can be no doubt that such an objective is a permissible one for a state.

The next and final question in this analysis then becomes whether the rule (or public policy) is rationally related to the state objective. Handicapped people often need to reside together in small groups, at least for a while, to achieve maximum independence. That these small group living arrangements involving people with strong emotional and psychological, if not biological, bonds can be more normalizing and humane when they occur in the midst of a "quiet place where yards are wide, people few, and motor vehicles restricted," *see Belle Terre*, 416 U.S. at 9, is a conclusion whose rationality is recognized by professionals in the human services area and by expert testimony at the trial of this case. In short, it makes perfect sense to help handicapped feel and act as other members of communities by helping them live where most of the community lives—in single family residential areas.

Given the analysis above, it is obvious that the Equal Protection Clause would not be violated by a public policy such as the one assumed by the court below. This result is not surprising. In the related area of zoning, differential treatment has long been constitutionally permissible if a suspect class or fundamental value is not involved in the zoning ordinance's classification scheme. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (upholding differing treatment of historical and non-historical structures); *Euclid v. Ambler Realty Co.*, 272 U.S.

365 (1926) (upholding differing treatment of industrial and non-industrial uses). Differing treatment here, if such there be, is equally permissible.

The decision below's reliance on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) *(Bakke)*, is, to say the least, puzzling. In *Bakke*, a racial classification was at issue, and such classifications are subjected to "the most rigid scrutiny." *Bakke, supra* at 291 (plurality opinion of Powell, J.). Here, as already explained, only minimal scrutiny is appropriate. The doubts expressed by Justice Powell about preference and relied upon by the lower court are in the context of *racial* preference, not preference in general. Establishment of a preference does not lead ineluctably to constitutional invalidation of the preference. In his *Bakke* opinion, Justice Powell himself observed that preferential weight can be given to a host of factors, including race. *Bakke, supra* at 315-21. In fact, since *Bakke*, the Court has upheld clear preferences, even in the racial area where the level of justification required is much higher than in this case. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). *Bakke* provides no support for the holding below, which is seriously misguided and fundamentally wrong.

Further elaboration is unnecessary. The federal constitutional decision before the Court for review is *clearly* wrong and wholly outside the boundaries of constitutional law. It is in direct conflict with principles established by this Court in many cases involving the Equal Protection Clause. The only real question, then, is not whether the decision is wrong, but whether the Court will take the case and declare it to be so. In addition to the reasons given below, it seems important that state courts, which increasingly are being called upon to decide federal constitutional issues, should have it made clear to them that they are not free to ignore this Court's decisions on those issues, as the court below did.

B. The court below adjudicated an important federal constitutional issue when the parties neither raised nor had standing to raise the federal constitutional issue, thereby undermining the principle of uniformity among the states on federal constitutional issues.

Ordinarily, a party must be a member of the class discriminated against in order to have standing to attack a rule for allegedly violating the Equal Protection Clause. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 571, 576 (1915).

In the court below, neither the neighboring property owners nor Mr. Shaver raised the equal protection issue of whether the public policy rule sought by Mr. Shaver would violate the Equal Protection Clause. The court raised the issue on its own. It should not have done so. Even if he had wanted to do so, Mr. Shaver had no standing to raise the issue because he would have benefited from the rule instead of being injured. The neighbors likewise had no standing to raise the issue because they are not among the class that supposedly would be excluded by the rule—that is, the class composed of all unrelated, non-handicapped people desiring to reside together in small numbers. The neighbors, after all, already live in the subdivision.

Therefore, since no party had standing to raise the decisive constitutional issue, the court below in effect rendered an advisory opinion. This unnecessary and improper adjudication of a federal constitutional issue by a state court itself raises an important federal question that, if it is not remedied by this Court, will contribute to the deterioration of uniformity among state courts on the important issue of who may litigate federal constitutional issues. This uniformity among the states on the resolution of federal constitutional questions has been a principle steadfastly adhered to by this Court since the landmark decision in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

It is true that in *Doremus v. Board of Education*, 342 U.S. 429 (1952), this Court held that it would not review a state court decision adjudicating a federal constitutional issue, despite the fact that the decision really was advisory because no case or controversy was present. *Doremus* at 434. *But cf. Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 524-26 (1959) (rejecting state court holding on federal constitutional standing issue). However, there is a crucial difference between *Doremus* and this case. In *Doremus*, the party seeking review in this Court failed to present a case or controversy within the meaning of Article III of the Constitution. Here, on the other hand, the petitioner has presented an Article III case or controversy which he seeks to have the Court review.

Scholars have criticized the aspect of the *Doremus* decision concerning its refusal to review state court decisions on federal constitutional issues which carry with them federal justiciability questions. For example, Professor Paul Freund has disagreed with the decision because it undercuts nationwide uniformity on the issue of standing to raise a federal question—an issue he sees as a federal one. *See* P. Freund, *Supreme Court and Supreme Law* 35 (Cahn ed. 1954).

The reach of the *Doremus* decision has never been explained by the Court, and this case presents the Court with an opportunity to

delimit it to situations in which a case or controversy is not presented to the Court at the time review is sought. In doing so, the Court will promote uniformity among the states on an issue that in itself presents an important federal question—the standing of a party to raise a federal constitutional question.

II. THE DECISION BELOW IS IN CONFLICT WITH AND SUBJECTS TO CONSTITUTIONAL INVALIDATION THE DECISIONAL LAW OF THE HIGHEST COURTS OF AT LEAST ELEVEN STATES.

The highest courts of at least ten states—Colorado, Georgia, Iowa, Minnesota, Montana, New Jersey, New York, North Carolina, Rhode Island, and Wisconsin[4]—have held that living arrangements such as the one in Mr. Shaver's house constitute "single families" under either "single family" zoning ordinances or "single family" restrictive covenants. The highest court of one state—New Hampshire[5]—while rejecting Mr. Shaver's position on the definition of "single family," prohibited enforcement of a "single family" zoning ordinance on state public policy grounds. As far as research reveals, the same issue has been addressed at the intermediate appellate court level in four states—Connecticut, Louisiana, Michigan, and Pennsylvania—other than Texas. Uniformly, those courts have adopted Mr. Shaver's position on the "single family" question.[6] Finally, based on decisions in slightly different contexts, the highest courts of at least three other

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[4] *Hessling v. City of Broomfield*, 563 P.2d (Colo. 1977); *Douglas County Resources, Inc. v. Daniel*, 280 S.E.2d 734 (Ga. 1981); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *State ex rel. Region II Child and Family Serv., Inc. v. Dist. Court of the Eighth Judicial Dist.*, 609 P.2d 245 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Group House of Port Washington, Inc. v. Bd. of Zoning and Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207 (1978); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 274 S.E.2d 174 (N.C. 1981); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I. 1981).

[5] *Region 10 Client Management, Inc. v. Town of Hampstead*, 424 A.2d 207 (N.H. 1980) (group home for houseparents and eight developmentally disabled adults).

[6] *City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc.*, 402 So.2d 259 (La.Ct.App. 1981); *Hopkins v. Zoning Bd. of Abington Township*, 423 A.2d 1082 (Pa.Commw.Ct. 1980); *Malcolm v. Shamie*, 95 Mich.App.132, 290 N.W.2d 101 (1980); *Oliver v. Zoning Comm'n of the Town of Chester*, 31 Conn.Sup. 197, 326 A.2d 841 (1974).

states—Illinois, Kentucky, and Ohio[7]—are likely, when directly presented with the issue, to adopt Mr. Shaver's position.

Each of these states' decisions was premised on state, not federal law. Additionally, each of the fifteen state decisions that dealt directly with living arrangements for handicapped people was permeated with considerations of state public policy favoring the establishment of group homes, although only the New Hampshire Supreme Court's decision in *Region 10* rested solely on the public policy argument.

The relevance of all these cases to the issue presented by this petition is that all of them now are subject to constitutional attack and invalidation based on the constitutional rule of law established by the Amarillo appellate court below.

While it may be safe to predict that state and federal courts that might be presented with litigation raising this issue will reject the court below's holding, it also is safe to predict that such litigation, with its attendant delay, expense, and burdening of crowded court dockets, will arise now that the premise for it has been given some respectability by the Amarillo court. Legal contests that heretofore had been confined nearly exclusively to state law issues would become federal cases and what formerly had been state law questions would become constitutionalized.

Perhaps the most important reason for granting the writ is that the decisional law of at least eleven and perhaps as many as eighteen states has been placed, suddenly and unexpectedly, under a constitutional cloud. Swift action by the Court in this case can remove that Cloud, without the Court's having to address the validity of a single state law, policy, or practice or the special functions of any coordinate or co-equal branch of government. Instead, the Court's performance of its role as final arbiter of the Constitution, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), would, if the ruling were favorable to Mr. Shaver, leave the states (and the federal government) freer to develop laws and policies addressing the problems and needs of the nation's handicapped citizens than they are under the legal principle established, but not examined, but the court below.

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[7] *City of Des Plaines v. Trottner*, 34 Ill.2d 432, 216 N.E.2d 116 (1966); *Robertson v. Western Baptist Hospital*, 267 S.W.2d 395 (Ky. 1954); *Saunders v. Clark County Zoning Dep't*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981) (reversing, in a non-disabled context, the prior position in *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981)).

III. THE LEGAL PRINCIPLE ESTABLISHED BY THE COURT BELOW INTERFERES WITH AND SUBJECTS TO CONSTITUTIONAL INVALIDATION HERETOFORE UNQUESTIONABLY IMPORTANT AND PERMISSIBLE STATE AND FEDERAL PUBLIC POLICY INITIATIVES.

A. The constitutional holding of the decision below would invalidate numerous state and federal statutes.

Because the court below's decision is virtually barren of analysis and explanation, the petitioner cannot canvass fully all the statutory enactments that, under the decision's holding, would be unconstitutional as a violation of the Equal Protection Clause.

At the federal level, Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793(a), would be unconstitutional. It explicitly requires certain federal contractors to establish affirmative action programs for handicapped people. *But compare Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding constitutionality of racial preference for federal grantees). Section 501 of the same act, 29 U.S.C. § 791(b), which requires affirmative action for handicapped federal employees, also would be unconstitutional.

At the state level in Texas, examples of statutory provisions arguably subject to invalidation because they create a "preference" for handicapped people include §§ 11.13(d) (partial property tax exemption for disabled person's homestead), 11.22 (property tax exemption for disabled veterans), and 152.086 (property tax exemption on motor vehicles modified for orthopedically handicapped persons) of the Texas Tax Code and §§ 121.003(b) (prohibiting common carriers from charging fares for handicapped persons' guide dogs, wheelchairs, etc.) and 121.003(c) (prohibiting public facilities from excluding handicapped persons using crutches, guide dogs, etc.) of the Texas Human Resources Code.

Again, as with the numerous state court decisions discussed earlier, the petitioner is not suggesting that other courts would follow the court below's holding and actually hold any of the cited statutes unconstitutional.[9] Instead, the petitioner has referred to these statutes to show the potential disruptiveness of the state

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[9] Indeed, this conlusion—that the decision of the court below on the equal protection issue is so clearly contrary to this Court's precedents—is the very basis for asking the Court to grant the petition in the first instance.

appellate court's seriously misguided holding insofar as it affects all statutory attempts to deal with issues of special importance to handicapped people.

B. The constitutional holding of the decision below would seriously impede widespread efforts to establish community living alternatives for handicapped people.

This Court recently has recognized that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081, "established a national policy to provide better care and treatment" to developmentally disabled citizens. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 31 (1981). One aspect of that better care and treatment is that such citizens should receive habilitation in a setting that is least restrictive of their personal liberty. *See* 42 U.S.C. § 6010(2). These policies, of course, both arose from and helped foster the nationwide trend toward deinstitutionalization of handicapped persons, primarily those who are mentally retarded.

One of the principal manifestations of that trend has been widespread attempts to establish community living alternatives for handicapped people. *See generally* Developmental Disabilities State Legislative Project of the ABA Commission on the Mentally Disabled, *Zoning for Community Homes Serving Disabled Persons* 1 (1974), *reprinted in* 2 Mental Disability L. Rep. 794 (1978). The recent vintage of most of the state court decisions already discussed is undoubtedly an outgrowth of these widespread efforts.

The decision below can only help squelch these efforts to implement well-established public policy. Its ill-considered legal principle would foreclose many of these efforts for handicapped citizens across the nation.[9] It is important for this Court to let the entities implementing these policies know if their efforts are—as they never before would have imagined them to be—unconstitutional or if, instead, they are permissible, although not necessarily required, methods for addressing the recognized needs of handicapped citizens.

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[9] The disruptiveness of the court's holding and its importance to the three severely handicapped women who may be forced to move out of Mr. Shaver's house is readily apparent.

CONCLUSION

For these reasons, the petitioner prays that the petition for a writ of certiorari be granted and that the judgment of the Court of Appeals for the Seventh Supreme Judicial District of Texas be vacated.

Respectfully submitted,

RENEA HICKS

Advocacy, Inc.
5555 North Lamar Blvd., Suite K-109
Austin, Texas 78751

Attorney for Petitioner

September, 1982